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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 487

KAY EDMONSTON, PETITIONER

v.

JOHN MOORE (J. P. MOHR) ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS JOHN MOORE (J. P. MOHR), HUGO B. PAUL, THOMAS GILLESPIE WALSH, ALBERT E. MARLAND, ISADORE RODIS, ZIGMOND M. LEBENSOHN, ROBERT T. MORSE IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia dismissed the complaint against the above-named defendants without opinion (R. 5). The Court of Appeals for the District of Columbia Circuit dismissed the appeal without opinion (R. 31).

JURISDICTION

The order of the Court of Appeals for the District of Columbia Circuit was filed on October 13, 1950 (R. 31). The petition for a writ of certiorari was filed on January 9, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an appeal lies from a decision of the district court, dismissing a complaint against less than all of the defendants in a conspiracy action, in the absence of the express determination that there is no just reason for delay and the express direction for the entry of judgment called for by F.R.C.P. Rule 54(b).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 54(b) of the Federal Rules of Civil Procedure:

> (b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as

to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. [As amended Dec. 27, 1946; effective March 19, 1948.]

STATEMENT

Petitioner was the subject of an insanity proceeding in the latter part of 1948. After having been committed to Gallinger Municipal Hospital and transferred to St. Elizabeth's Hospital (R. 1), she was discharged when a jury found her to be of sound mind (R. 1, 8). Respondents were connected with these proceedings in connection with their official duties. Respondents Walsh, Marland, Rodis, Lebensohn and Morse had examined petitioner in their capacity as members of the Commission on Mental Health (R. 3-4); respondent Paul, a doctor at St. Elizabeth's Hospital, had treated petitioner while she was held there (R. 15-16); respondent Mohr, an F.B.I. agent, had interviewed petitioner prior to the initiation of the insanity proceedings (R. 16, 20).

After her discharge petitioner brought this action[1] against the above-named respondents and nine other persons (Pet. 5)[2] for "damages for conspiracy, malicious inquisition of lunacy, and

[1] The complaint was filed on July 15, 1949 (R. 1), *i.e.*, subsequent to the effective date of the amendment of F. R. C. P. Rule 54(b).

[2] Including her former attorney (Stanley, R. 18), relatives who signed commitment papers, and other physicians.

false imprisonment" (R. 1). Paragraph 2 of the complaint alleges (R. 1):

> That the defendants did unlawfully, wilfully and knowingly conspire together to maliciously institute lunacy proceedings against the plaintiff * * *

The above-named seven respondents moved to dismiss the complaint on the ground that the acts complained of were performed by them within the general scope of their official duties, and that they were consequently immune from personal liability.[3] The district court granted the motion; the order dismissing the complaint as to these defendants (R. 5) did not determine expressly that there was no just reason for delay and did not direct expressly the entry of judgment. The action remained pending in the district court as to the other eight defendants.[4] Petitioner appealed to the Court of Appeals for the District of Columbia Circuit, which dismissed the appeal on the ground that the order from which petitioner sought to appeal was not a final judgment of the district court (28 U.S.C. 1291) (R. 31). Petitioner seeks a review of this decision.

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[3] The cases of *Brown* v. *Rudolph*, 25 F. 2d 540 (C.A. D.C.), certiorari denied, 277 U.S. 605; and *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.), certiorari denied, 305 U.S. 643 (R. 3ff), were specifically cited to the district court (R. 14-15).

[4] The district court dismissed the complaint against an eighth defendant (Stanley) in a separate order (R. 4).

ARGUMENT

The decision of the Court of Appeals was obviously correct. Pursuant to 28 U.S.C. 1291 appeals lie only from final decisions of the district courts. The determination whether a decision of the district court disposing of less than the entire action was final or merely interlocutory presented an extremely troublesome question for more than half a century.[5] *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 511; *Reeves* v. *Beardall*, 316 U.S. 283. This uncertainty entailed serious hazards for the parties, especially for those who failed to take an appeal in the mistaken belief that the decision was not final. Cf. *Dickinson* v. *Petroleum Corp.*, *supra*, at 512.

The elimination of this hardship was the principal purpose of the revision of F.R.C.P. Rule 54(b).[6] *Dickinson* v. *Petroleum Corp.*, *supra*, at 512; Note to Rule 54(b), Advisory Committee's Report of Proposed Amendment to Rules of Civil Procedure (1946) 70-72. The revisers chose the simple solution that every decision of the district court which disposes of less than the entire action is considered interlocutory unless the district court

[5] The dismissal, as to less than all of the alleged conspirators, of a complaint based on a conspiracy, however, has consistently been considered an unappealable interlocutory decision. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262; *Garbose* v. *George A. Giles Co.*, 183 F. 2d 513 (C.A. 1).

[6] Rule 54(b) applies to a joinder of parties as well as to a joinder of claims; see *e.g.*, *Garbose* v. *George A. Giles Co.*, *supra*; Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 503.

expressly determines that there is no just reason for delay and expressly directs the entry of a judgment. In the instant case, the district court failed to make such determination and direction; hence, the decision is not appealable.[7] *Garbose* v. *George A. Giles Co.*, 183 F. 2d 513 (C.A. 1);[8] *Kam Koon Wan* v. *E. E. Black, Limited*, 182 F. 2d 146 (C.A. 9); *Flegenheimer* v. *Manitoba Sugar Co., Ltd.*, 182 F. 2d 742 (C.A. 2); *Winsor* v. *Daumit*, 179 F. 2d 475 (C.A. 7).

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[7] Inasmuch as the order of the district court would have been interlocutory even prior to the amendment of Rule 54(b) (*supra*, fn. 5), this case does not present the problem whether the amendment did or could render interlocutory an order considered as final and appealable prior to the revision. All the circuits which up to now have been confronted with this problem have answered the question in the affirmative. Cf. *David* v. *District of Columbia*, 14 Fed. Rul. Serv. 54(b), Case 6, decided December 14, 1950 (C.A.D.C.).

[8] There, the court of appeals held that a "final" summary judgment, expressly directing the entry of a judgment dismissing the complaint against less than all of the co-conspirators, was interlocutory for lack of an express determination to the effect that there was no just reason for delay.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1951.

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